Bodco Engineering and Construction Sdn Bhd v Tribunal For Housing Purchaser Claims & Ors

COURT OF APPEAL (KUCHING) — CIVIL APPEAL NO Q-01–172–05 OF 2014
TENGKU MAIMUN, AHMADI ASNAWI AND IDRUS HARUN JJCA
9 MAY 2017

Contract — Housing development contract — Breach — Provision in contract for payment of agreed liquidated and ascertained damages ('LAD') for late delivery of vacant possession contained special clause stating building only deemed completed when certificate of fitness for occupation ('CF') issued — Whether special clause made it obligatory for developer to not only hand over vacant possession but also procure CF within 24 months of date of SPA or pay LAD in default — Whether special clause statutorily sanctioned to protect house buyers — Whether developer's argument that it was only obliged to deliver vacant possession rendered special clause redundant and meaningless and such a construction could not be adopted — Whether LAD therefore had to be computed up to date CF obtained and not up to date building physically completed

On 12 August 2006, the second and third respondents ('the respondents') entered into separate sale and purchase agreements ('SPA') with the appellant ('BODCO'), a licensed housing developer, to buy single-storey semi-detached houses. It was agreed under cl 17(1) and (2) of the SPA that the appellant had to hand over vacant possession of the houses to the respondents within 24 months of the date of the SPA, ie by 11 August 2008 and if it failed to do so, BODCO would pay them such sum as was specified in the Sixth Schedule of the SPA as agreed pre-estimated liquidated damages ('LAD') until the date of completion of the houses. Clause 17(3) provided that 'For the purpose of this Clause, the building is deemed to be completed when the Certificate stipulated in Clause 20 ... has been issued'. Clause 20 required BODCO to apply for, and do all things necessary to secure, the certificate of fitness for occupation ('OP') for the houses. Clause 19(1) of the SPA provided that 'Upon the issuance of a Certificate by the Vendor's Architect certifying that the construction of the Building has been duly completed and water and electricity are available for connection to the said Building and the Vendor has applied for the issuance of the Certificate of Fitness For Occupation ... and the Purchaser having performed and observed all the terms and covenants on his part under this Agreement, the Purchaser shall have possession of the said Property'. Clause 19(2) stated that upon the expiry of 14 days from the date of a notice from BODCO requesting the respondents to take possession of the houses, whether or not they actually entered into possession or occupation of the properties, the respondents shall be deemed to have taken delivery of vacant

possession. The houses in the instant case were only completed on 20 April 2010 as stated in the certificate of practical completion ('CPC') issued by BODCO's architect. On 21 April 2010, and again twice in May 2011, BODCO gave written notices to the respondents to take vacant possession of the houses but they refused to do so. The OP for the houses was only issued by the local authority on 14 November 2012. The respondents filed claims with the first respondent ('the tribunal') for LAD for late delivery of vacant possession. The tribunal awarded LAD for 51 months stretching from 11 August 2008–14 November 2012 (the date of issuance of the OP). The appellant disagreed with the computation saying the cut-off date should be 21 April 2010 ie the date of issuance of the notice to take possession and applied to the High Court for judicial review to quash the tribunal's award. The appellant argued that the houses were completed on the date the CPC was issued and that under cl 17(2) BODCO was only obliged to hand over vacant possession to the respondents and not to give them 'the right to occupy' the properties; hence, the computation period for the LAD should stop at the date of issuance of the CPC under cl 19(1) and not the date of issuance of the OP under cl 20. The High Court dismissed BODCO's application holding that the words 'date of completion' in cl 17(2) of the SPA was governed by cl 17(3) which deemed the building to be completed only when the OP under cl 20 was issued. In the instant appeal against the High Court's decision, the appellant argued that cl 17(3) was not a final and conclusive clause but merely a deeming provision that created a rebuttable presumption, in that in the absence of any evidence to show the contrary position, it merely deemed the building to have been completed when the OP was issued. However, if there was evidence to show the building was actually completed earlier, then the presumption under cl 17(3) would be rebutted. Scheduled for hearing together with the instant appeal were four other related appeals by the tribunal (with BODCO as the respondent) against the decision of another High Court which decided in BODCO's favour on the same issues that arose in the instant appeal. The parties agreed that the outcome in the instant appeal would decide the other four appeals.

Held, dismissing the instant appeal and, consequently, allowing the four related appeals by the tribunal:

(1) The SPA in the instant appeal, in particular cl 17(3) was not a mere agreement between two contracting parties but a statutorily-sanctioned provision. The SPA was substantially governed by reg II and Schedule G of the Housing Developers (Control and Licensing) Regulations 1988 ('the Regulations'). They were actually provisions of Schedule H which had been imposed by law upon the parties and, hence, were statutory provisions in that sense. Clause 17(3) was peculiar to the State of Sarawak. The formula in cl 17 was designed to protect home buyers after balancing the interests of buyers and developers in Sarawak. It was meant

to be implemented and executed in the event of breaches of cl 17(1) and (2). Hence, it was only appropriate to adopt, in all the circumstances of the case, an interpretation that was in accord with s 17A of the Interpretation Acts 1948 and 1967 which stated that a construction that would promote the purpose or object underlying an Act shall be preferred over a construction that would not (see paras 37–38).

(2) The appellant's submission that the LAD should only be computed up to 21 April 2010 when vacant possession was delivered by its notice to that effect offended s 17A of the Interpretation Acts 1948 and 1967. The argument also made nonsense of the purpose of the Regulations or rather its parent Act, the Housing Developers Act, and rendered cl 17(3) of the SPA obtuse and redundant, defeating the paramount objective of inserting that provision into the SPA (see paras 39–40).

(3) The purport of cl 17(3) was plain and clear. It strengthened the scope of cl 17(2) by offering a definitive meaning of 'the date of completion of the said building' appearing therein. It simply meant that what amounted to 'date of completion' was the delivery of a completed and habitable building fit for human occupation together with the certificate of fitness for occupation ('CF') issued under cl 20 of the SPA. The mere delivery of vacant possession of the property by way of giving notice of vacant possession to the buyers under cl 19(1) and (2) was no longer sufficient to constitute completion. The requirement had now been modified in favour of house buyers to provide additional protection from further victimisation by unscrupulous developers by the insertion of cl 17(3) which, when read as a whole in the context of the entire SPA, and not in isolation as suggested by the appellant, reflected the will of the contracting parties (see paras 41–42).

(4) The right of occupation was conferred upon the second and third respondents by virtue of cl 17 wherein the appellant was encumbered not only to deliver vacant possession within 24 months from the date of the SPA under cl 17(1), but also, under cl 17(3), to procure the issuance of the certificate stipulated under cl 20 within the same period. Only then was the property considered fit for occupation and could hence be legally occupied. Anything less than that infringed the SPA and the appellant was liable to pay damages as the second and third respondents could not legally enjoy the use of their properties. Hence, there was no basis for the appellant to say that cl 17 of the SPA did not confer any 'right of occupation' of the properties to the second and third respondents but only the 'right of possession' (see paras 51 & 53).

(5) Clause 17(3) could not be read subject to cl 19(1) as suggested by the appellant for to do so would render cl 17(3) inoperable, redundant and unable to serve its purpose of being enacted. It was a stand-alone provision. Subjecting cl 17(3) to the provision of cl 19(1) would cause the

enlargement or improvement of the terms of the SPA by favouring only the appellant and leaving home-buyers out in the cold. It would equally offend the purport of the HDCL Regulations and oust the primary purpose of having cl 17(3) in the agreement (see paras 46–47).

[Bahasa Malaysia summary

Pada 12 Ogos 2006, responden kedua dan ketiga ('responden-responden') memasuki perjanjian jual beli berasingan ('PJB tersebut') dengan perayu ('BODCO'), pemaju perumahan berlesen, untuk membeli rumah-rumah berkembar satu tingkat. Pihak-pihak bersetuju di bawah klausa 17(1) dan (2) PJB bahawa perayu hendaklah memberikan milikan kosong rumah-rumah tersebut dalam masa 24 bulan dari tarikh PJB tersebut, iaitu pada 11 Ogos 2008 dan sekiranya ia gagal berbuat sedemikian, BODCO akan membayar mereka sejumlah wang seperti yang ditetapkan di dalam jadual keenam PJB tersebut sebagai *agreed pre-estimated liquidated damages* ('LAD') sehingga tarikh siap rumah-rumah tersebut. Klausa 17(3) memperuntukkan bahawa 'For the purpose of this Clause, the building is deemed to be completed when the Certificate stipulated in Clause 20 ... has been issued'. Klausa 20 menghendaki BODCO untuk memohon, dan membuat kesemua perkara yang perlu untuk menjamin, Sijil Kelayakan Menduduki ('OP') untuk rumah-rumah tersebut. Klausa 19(1) PJB tersebut memperuntukkan bahawa 'Upon the issuance of a Certificate by the Vendor's Architect certifying that the construction of the Building has been duly completed and water and electricity are available for connection to the said Building and the Vendor has applied for the issuance of the Certificate of Fitness For Occupation ... and the Purchaser having performed and observed all the terms and covenants on his part under this Agreement, the Purchaser shall have possession of the said Property'. Klausa 19(2) menyatakan bahawa atas penamatan 14 hari dari tarikh notis daripada BODCO meminta responden-responden untuk mengambil milikan kosong rumah-rumah tersebut, sama ada mereka sebenarnya memasuki pemilikan atau penghunian terhadap rumah-rumah tersebut atau tidak, responden-responden akan dianggap telah mengambil penyerahan milikan kosong. Rumah-rumah tersebut dalam kes ini hanya siap pada 20 April 2010 seperti yang dinyatakan di dalam sijil penyiapan praktikal ('SPP') yang dikeluarkan oleh arkitek BODCO. Pada 21 April 2010, dan dua kali pada Mei 2011, BODCO memberi notis bertulis kepada responden-responden untuk mengambil milikan kosong terhadap rumah-rumah tersebut tetapi mereka enggan berbuat demikian. OP untuk rumah-rumah tersebut hanya dikeluarkan oleh pihak berkuasa tempatan pada 14 November 2012. Responden-responden memfailkan tuntutan-tuntuan dengan responden pertama ('tribunal') untuk LAD bagi penyerahan lewat milikan kosong. Tribunal mengawardkan LAD untuk 51 bulan bermula dari 11 Ogos 2008–14 November 2012 (tarikh pengeluaran OP tersebut). Perayu tidak bersetuju dengan pengiraan dan menyatakan tarikh pemotongan sepatutnya pada 21 April 2010 iaitu tarikh pengeluaran notis untuk mengambil milikan dan

A memohon kepada Mahkamah Tinggi untuk semakan kehakiman untuk membatalkan award tribunal tersebut. Perayu berhujah bahawa rumah-rumah adalah siap pada tarikh SPP tersebut dikeluarkan dan bahawa di bawah klausa 17(2) BODCO hanya bertanggungjawab untuk memberikan milikan kosong kepada responden-responden dan bukan untuk memberikan kepada B mereka 'the right to occupy' hartanah-hartanah tersebut; maka, tempoh pengiraan untuk LAD patut berhenti pada tarikh pengeluaran SPP tersebut di bawah klausa 19(1) dan bukan tarikh pengeluaran OP di bawah klausa 20. Mahkamah Tinggi menolak permohonan BODCO dengan memutuskan bahawa perkataan-perkataan 'date of completion' di dalam klausa 17(2) PJB C tersebut dikawal oleh klausa 17(3) yang menganggap bangunan disiapkan hanya apabila OP di bawah klausa 20 dikeluarkan. Dalam rayuan ini terhadap keputusan Mahkamah Tinggi, perayu berhujah bahawa klausa 17(3) bukan klausa akhir dan konklusif tetapi hanya peruntukan yang membentuk D anggapan yang boleh dipatahkan, di mana di dalam ketiadaan apa-apa keterangan untuk menunjukkan kedudukan bertentangan, ia hanya menganggap bangunan telah siap apabila OP dikeluarkan. Walau bagaimanapun, jika terdapat keterangan untuk menunjukkan bangunan sebenarnya siap terlebih dahulu, oleh itu anggapan di bawah klausa 17(3) akan E dipatahkan. Dijadualkan untuk didengar bersama dengan rayuan ini adalah empat rayuan berkaitan yang lain oleh tribunal (dengan BODCO sebagai responden) terhadap keputusan Mahkamah Tinggi lain yang mana memutuskan memihak BODCO atas isu-isu yang sama yang berbangkit dalam rayuan ini. Pihak-pihak bersetuju bahawa keputusan dalam rayuan ini F akan memutuskan empat rayuan yang lain.

Diputuskan, menolak rayuan ini dan, akibatnya, membenarkan keempat-empat rayuan berkaitan oleh tribunal:

G (1) PJB dalam rayuan ini, terutamanya klausa 17(3) bukan hanya perjanjian di antara dua pihak yang berkontrak tetapi peruntukan diperakui secara statutori. PJB secara substansial dikawal oleh peraturan II dan Jadual G Peraturan-Peraturan Pemaju Perumahan (Kawalan dan Pelesenan) 1988 ('Peraturan-Peraturan tersebut'). Ia sebenarnya peruntukan-peruntukan H Jadual H yang telah dikenakan oleh undang-undang ke atas pihak-pihak dan, maka adalah dalam erti kata itu peruntukan-peruntukan statutori. Klausa 17(3) adalah khusus pada Negeri Sarawak. Formula dalam klausa 17 direka untuk melindungi pembeli-pembeli rumah selepas mengimbang kepentingan pembeli-pembeli dan pemaju-pemaju di I Sarawak. Ia adalah bermaksud untuk dijalankan dan dilaksanakan sekiranya berlaku kemungkiran klausa 17(1) dan (2). Maka, ia hanya wajar untuk menggunakan, dalam kesemua keadaan kes, tafsiran yang sesuai dengan s 17A Akta Tafsiran 1948 dan 1967 yang menyatakan bahawa pentafsiran yang akan mempromosikan tujuan atau objek yang

mendasari Akta akan lebih disukai daripada pentafsiran yang tidak (lihat perenggan 37–38).

(2) Penghujahan perayu bahawa LAD hanya boleh dikira setakat 21 April 2010 apabila milikan kosong diserahkan oleh notisnya telah melanggar s 17A Akta Tafsiran 1948 dan 1967. Penghujahan tersebut juga mensia-siakan tujuan Peraturan-Peraturan ataupun Akta induknya, Akta Pemaju Perumahan, dan menyebabkan klausa 17(3) PJB sia-sia dan berlebihan, mematahkan objektif utama untuk memasukkan peruntukan tersebut ke dalam PJB (lihat perenggan 39–40).

(3) Tujuan klausa 17(3) adalah jelas dan nyata. Ia menguatkan skop klausa 17(2) dengan menawarkan maksud muktamad 'the date of completion of the said building' yang terdapat di dalamnya. Ia hanya bermaksud bahawa ia merupakan 'date of completion' adalah penyerahan bangunan yang siap dan boleh diduduki untuk penghunian bersama dengan sijil kelayakan menduduki ('CF') dikeluarkan di bawah klausa 20 PJB. Penyerahan milikan kosong hartanah melalui pemberian notis milikan kosong kepada pembeli-pembeli di bawah klausa 19(1) dan (2) semata-mata tidak lagi mencukupi untuk mentafsir penyiapan. Kehendak tersebut sekarang ini telah diubah suai untuk memihak pembeli-pembeli rumah untuk memberikan perlindungan tambahan daripada pemangsaan selanjutnya oleh pemaju yang tidak bertanggungjawab dengan pemasukan klausa 17(3) yang mana, apabila dibaca secara keseluruhan dalam konteks PJB sepenuhnya, dan bukan terpencil seperti yang dicadangkan oleh perayu, membayangkan niat pihak-pihak yang berkontrak (lihat perenggan 41–42).

(4) Hak penghunian diberikan kepada responden kedua dan ketiga mengikut klausa 17 di mana perayu dibebani bukan sahaja untuk menyerahkan milikan kosong dalam masa 24 bulan dari tarikh PJB di bawah klausa 17(1), tetapi juga, di bawah klausa 17(3), untuk mendapatkan pengeluaran sijil yang ditetapkan di bawah klausa 20 dalam tempoh yang sama. Hanya setelah itu hartanah dipertimbangkan sebagai sesuai untuk penghunian dan oleh itu boleh dihuni secara sah. Apa-apa yang kurang daripada itu melanggar PJB dan perayu bertanggungjawab untuk membayar ganti rugi kerana responden-responden kedua dan ketiga tidak boleh dari segi undang-undang menikmati penggunaan hartanah mereka. Maka, tidak terdapat asas untuk perayu menyatakan bahawa klausa 17 PJB tidak memberi apa-apa 'right of occupation' terhadap hartanah-hartanah kepada responden-responden kedua dan ketiga tetapi hanya 'right of possession' (lihat perenggan 51 & 53).

(5) Klausa 17(3) tidak boleh dibaca tertakluk kepada klausa 19(1) seperti yang dicadangkan oleh perayu kerana untuk berbuat demikian akan menyebabkan klausa 17(3) tidak boleh digunakan, berlebihan dan tidak

boleh memenuhi tujuan ianya digubal. Ia adalah peruntukan tersendiri. Subjekkan klausa 17(3) kepada peruntukan klausa 19(1) akan menyebabkan pembesaran atau memperbaiki terma-terma PJB dengan memihak hanya kepada perayu dan tidak mengendahkan pembeli-pembeli rumah. Ia akan sama sekali melanggar tujuan Peraturan-Peraturan dan menyingkirkan tujuan utama menggubal klausa 17(3) di dalam perjanjian (lihat perenggan 46–47).]

Notes

For a case on breach of housing development contract, see 3(4) *Mallal's Digest* (5th Ed, 2015) para 5649.

Cases referred to

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1947] 2 All ER 680, CA (refd)

Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor [2006] 2 MLJ 685; [2006] 3 CLJ 544, FC (refd)

Chinaya a/l Ganggaya v Sentul Raya Sdn Bhd [2008] 2 MLJ 468; [2008] 3 CLJ 23, HC (refd)

Hariram a/l Jayaram & Ors v Sentul Raya Sdn Bhd [2003] 1 MLJ 22; [2002] 4 CLJ 796, HC (refd)

Lucy Wong Nyuk King (f) & Anor v Hwang Mee Hiong (f) [2014] 6 MLJ 686; [2014] 8 CLJ 865, CA (refd)

Mature Land Sdn Bhd v Atlantic Plantation Sdn Bhd [2013] 4 MLJ 565, CA (refd)

Maxisegar Sdn Bhd v Veronica Lee Ha Ling & Ors [2011] 5 MLJ 913, CA (distd)

Mulpha Pacific Sdn Bhd v Paramount Corp Bhd [2003] 4 MLJ 357; [2003] 4 CLJ 294, CA (refd)

South East Asia Brickworks Sdn Bhd v Maria Antonette [1979] 1 MLJ 46 (refd)

Syarikat Lean Hup (Liew Brothers) Sdn Bhd v Cheow Chong Thai [1988] 3 MLJ 221, HC (distd)

Veronica Lee Ha Ling & Ors v Maxisegar Sdn Bhd [2011] 2 MLJ 141, FC (refd)

Legislation referred to

Building Ordinance 1994 (Cap 8) Form F

Housing Developers (Control and Licensing) Ordinance 1993 ss 17, 17A

Housing Developers (Control and Licensing) Regulations 1988 reg II, Schedules G, H

Housing Developers (Control and Licensing) Regulations 1998 Form G

Housing Developers (Tribunal For Housing Purchaser Claims) Regulations 2010 s 24

Interpretation Acts 1948 and 1967 s 17A

Rules of Court 2012 O 53

Appeal from: Application For Judicial Review No SBW-13-JR-4/8 of 2013 (High Court, Sibu)

Victor YC Ng (CH Tay & Partners) for the appellant.
Talat Mahmood Abd Rashid (Mcwillyn Jiok and Mohd Adzrul Adzlan with him) (State Legal Officer, Sarawak State Attorney General's Chambers) for the respondents.

Ahmadi Asnawi JCA:

[1] There were four other civil appeals of a related nature arising from similar applications for judicial review, scheduled for hearing on the same instant (22 October 2015), namely:

(a) Civil Appeal No Q-01–475–12 of 2014
Appellant: Tribunal For Housing Purchaser Claims
Respondent: Bodco Engineering and Construction Sdn Bhd;

(b) Civil Appeal No Q-01–476–12 of 2014
Appellant: Tribunal For Housing Purchaser Claims
Respondent: Bodco Engineering and Construction Sdn Bhd;

(c) Civil Appeal No Q-01–477–12 of 2014
Appellant: Tribunal For Housing Purchaser Claims
Respondent: Bodco Engineering and Construction Sdn Bhd; and

(d) Civil Appeal No Q-01–478–12 of 2014
Appellant: Tribunal For Housing Purchaser Claims
Respondent: Bodco Engineering and Construction Sdn Bhd.

[2] The court of first instance, the High Court, heard all the four abovesaid applications for judicial review together and delivered a single common decision, favourable to Bodco Engineering and Construction Sdn Bhd ('BODCO'), that applied for all the four applications. Hence, these four appeals by Tribunal For Housing Purchaser Claims ('tribunal'). The application for judicial review giving rise to the present appeal was, however, heard and decided earlier before another bench of the High Court. The decision nevertheless favoured the tribunal. Thus, the present appeal by BODCO.

[3] At the case management stage, the parties agreed to hear the present appeal together with the four abovesaid appeals on account that these five appeals involved the same parties (Tribunal For Housing Purchaser Claims and Bodco Engineering and Construction Sdn Bhd) and shared common and identical issues for determination.

A **[4]** Before us, the parties further agreed that only the present appeal is to be litigated and its outcome is to bind the four other appeals. Accordingly, each party had filed common submissions, applicable for all the five appeals, including the present one.

B **[5]** The individual respondents before the High Court in these five appeals (the individual house buyers from the developer, BODCO) have not appealed against the decisions of both the High Courts.

C **[6]** These five appeals, in essence, were all about the computation of liquidated agreed damages ('LAD') owing by the developer, BODCO, to its house buyers for late completion based upon the interpretation of the written contract entered between the developer and the buyers.

D **[7]** On 13 October 2013, the applicant/appellant was granted leave to commence proceedings under O 53 of the Rules of Court 2012, for the following reliefs:

(a) an order of certiorari to remove into the High Court of Sabah and
E Sarawak at Sibu to quash the award (Case No TTPRS/0004/13) of the Tribunal For Housing Purchaser Claims delivered on 29 May 2013 by which the tribunal held that there was a delay of 51 months for the applicant to complete the house and that the second and third respondents ('the claimants') are entitled to a claim of RM20,400
F (RM400 x 51 months) being agreed pre-liquidated damages ('LAD');

(b) a declaration that the LAD under cl 17(2) of the sale and purchase agreement dated 12 August 2006 ('SPA') should be calculated from the stipulated completion date under the SPA, ie on 11 August 2008 till the issuance of the notice to take vacant possession ie on 21 April 2010; and
G

(c) an order that the applicant do pay RM8,133.30 to the second and third respondents being the delay of 20 months and ten days in delivering possession of sublot 147, Lot 429, Block 11, Seduan Land District.

H **[8]** The grounds upon which the reliefs are sought are:

(a) the tribunal had committed errors of law and/or acted unlawfully and/or in excess of its jurisdiction or power by basing its decision on irrelevant facts and omitting to address relevant ones in concluding that there was
I a delay of 51 months for the applicant to complete the house; and

(b) the tribunal's decision was jurisdictionally bad for '*Wednesbury* unreasonableness' in that no reasonable court similarly circumstanced would have concluded, on the facts available that there was a delay of 51 months for the applicant to complete the house.

[9] In the event the learned judge dismissed the appellant's application for judicial review with no order as to costs, and correspondingly affirmed the tribunal's award. A

THE BACKGROUND FACTS B

[10] The second and third respondents had entered in a sale and purchase agreement ('SPA') dated 12 August 2006 for the sale and purchase of a unit of a single storey semi-detached house described as sublot 147, Lot 429, Block 11, Seduan Land District, for the sum of RM170,000 ('the property') from the appellant being a licensed housing developer under the Housing Developers (Control and Licensing) Ordinance 1993 ('the HDO'). C

[11] The first respondent is established pursuant to s 17A of the HDO and s 24 of the Housing Developers (Tribunal For Housing Purchaser Claims) Regulations 2010, which was created to regulate the operations of the tribunal. The jurisdictional limitation of the tribunal is expressly stated in s 17 of the HDO. D

[12] Pursuant to cl 17(1) and (2) of the SPA, it was agreed that the property shall be completed by the appellant and the appellant to deliver vacant possession of the same to the second and third respondents within 24 months from the date of the execution of the SPA ie on 11 August 2008. In the event of failure to deliver the property within the stipulated time, the appellant shall pay the second and third respondents LAD to be calculated pursuant to the SPA. E F

[13] However, the property was only completed on 20 April 2010 as recorded in the certificate of practical completion ('CPC') by DK Architect pursuant to cl 19(1) of the SPA — see p 121, Vol 3, Part C, record of appeal ('RR'). G

[14] Pursuant to cl 19(1) of the SPA, the appellant then delivered vacant possession of the said property to the second and third respondents vide letter dated 21 April 2010 — p 122, Vol 3, Part C, RR. Under cl 19(2) of the SPA, 14 days hereafter whether or not the purchaser has actually entered into possession or occupation of the said property, the purchaser shall be deemed to have taken delivery of vacant possession and the vendor thereafter shall not be liable for any loss or damage to the said property or to the fixtures and fittings therein. H I

[15] The appellant then applied for the issuance of occupation permit ('OP') pursuant to cl 19(1) on 14 September 2010 — see pp 123–124, Vol 3, Part C; RR.

A **[16]** The appellant then issued another notice to take vacant possession of the property on 17 May 2011. However the second and third respondents refused to take vacant possession of the same — see pp 125–126, Vol 3, Part C, RR.

B **[17]** The appellant informed the second and third respondents that the OP has again been applied on 24 May 2011 — see p 127, Vol 3, Part C, RR.

[18] The appellant sent another notice of delivery of vacant possession on
C 26 May 2011 pursuant to cl 19(2) — see p 128, Vol 3, Part C, RR.

[19] On 8 June 2011, Majlis Perbandaran Sibu informed the appellant that their application for OP cannot be approved and they were required to rectify all the defects — see pp 129–130, Vol 3, Part C, RR.

D **[20]** The appellant, through their architect applied for the final issuance of OP on 12 December 2011 — see p 131, Vol 3, Part C, RR.

E **[21]** The OP for the property was finally issued on 14 November 2012 by the Majlis Perbandaran Sibu — see p 132, Vol 3, Part C of RR.

[22] It is not disputed that the appellant was late in the delivery of vacant possession of the said property to the second and third respondents.
F Consequently both the respondents filed their claim for LAD to the tribunal (the first respondent) for the late delivery of vacant possession of the said property at the rate of RM400 per month (pro rateable daily) from the completion date to the date of delivery of vacant possession of the said property, pursuant to cl 17(1), (2) and (3) of the SPA.

G **[23]** At the hearing before the first respondent, the first respondent had however, computed the LAD from the initial completion date, ie 11 August 2008 to the date of issuance of occupation permit ie on 14 November 2012.

H **[24]** The applicant contends that the first respondent's computation of the LAD was wrong and it has affected the appellant, adversely as follows:

(a) the first respondent's computation:
from 11 August 2008 to date of issuance of OP ie 14 November 2012
I = 51 months x RM400 = RM20,400; and

(b) the appellant's computation:
from 11 August 2008 to date of issuance of notice to take vacant possession ie 21 April 2010 = 20 months and 10 days x RM400 = RM8,133.30.

[25] Dissatisfied with the aforesaid award, the appellant filed this application for judicial review under O 53 of the Rules of Court 2012 to review and quash the said first respondent's award.

THE DECISION OF LEARNED JUDGE

[26] Her Ladyship held, inter alia, at pp 27–28, Vol 1, Part A, RR of her grounds of judgment, as follows:

> ... Reading the SPA as a whole, it is clear that cl 17 is a specific provision dealing with the eventuality of the failure to deliver vacant possession within the stipulated time. As mentioned earlier, by its sub-cl (1), the applicant is contractually bound to complete the construction of the building and shall hand over vacant possession within 24 months of the date of the SPA. As we have seen the applicant failed to deliver vacant possession within the stipulated time. It is for such eventuality that sub-cl (2) comes into play. ... The plain meaning of the provisions of sub-cl (2) is that in the event of failure by the applicant to deliver vacant possession within 24 months of the date of SPA, the applicant shall pay to the respondents LAD until the date of completion of the building. To my mind, the meaning to be attributed to the words 'date of completion' in sub-cl (2) is governed by sub-cl (3). Subclause (3) reads: '*For the purpose of this clause*, the Building is *deemed to be completed* when the Certificate stipulated in clause 20 below has been issued'. It is to be noted that sub-cl (3) begins with the phrase 'For the purpose of this clause'. Giving the words 'for the purpose of this clause' their plain meaning, sub-cl (3) is meant to apply specifically to cl 17. By sub-cl (3) it is provided that the building is deemed to be completed when the occupation permit as stipulated in cl 20 has been issued. By extension therefore, the 'date of completion' in sub-cl (2) means the date when the occupation permit as stipulated in cl 20 has been issued. Hence, in my view, the tribunal has not erred in computing LAD from the initial completion date (14 August 2008) to the date of issuance of the occupation permit on 14 November 2012.

[27] In short, Her Ladyship had ruled that the meaning of 'the date of completion in cl 17(2) of the SPA is the date that the OP is issued under cl 20 of the SPA'.

THE APPEAL BEFORE US

[28] Learned counsel for the appellant submitted that the 'Date of Completion' of the said building is the date of issuance of the 'Certificate of Practical Completion' ('CPC') because cl 19(1) of the SPA clearly stipulates that 'Upon the issuance of the CPC by the Architect certifying that the construction of the said Building has been duly completed ...' and the only person qualified to certify the completion of the building is the architect and not the council as can be seen from the contents of the CPC. The application for the issuance of OP (Form F) further confirmed that the architect is the only person qualified to certify the completion of the building.

[29] Learned counsel further reiterated that under sub-cl 17(1) and 17(2), the appellant is only under an obligation to complete the building and to hand over vacant possession of the same pursuant to cl 19(2) of the SPA, by issuing a notice to take vacant possession of the said building to the second respondent within 24 months from the date of the SPA. Upon failure to do so, the appellant is to pay LAD for late delivery of vacant possession at the agreed rate computed from the 'Initial completion date under the contract' until the 'Date of Completion'.

[30] The obligation of the appellant never extends to giving the 'right of occupation' within 24 months as distinct from the 'right of possession'. The Sixth Schedule of the SPA which referred to cl 17(2) states that the 'pre estimated liquidated damages' payable under the SPA is for 'payment by vendor in default of handing over of vacant possession and not failure to give the right of occupation'. This payment of LAD only extends from the initial completion date until the date of issuance of CPC under cl 19(1) and not until the date of issuance of OP under cl 20.

[31] The aforesaid submissions by learned counsel for the appellant were essentially the findings of the learned judge in the four other appeals alluded to earlier where the decision heavily favoured the appellant.

[32] Learned counsel for the appellant also echoed the further findings of the learned judge in the said four other appeals when he submitted that cl 17(3) is not a final and conclusive clause and it is only a deeming provision creating rebuttable presumption. Learned counsel relied on *Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor* [2006] 2 MLJ 685; [2006] 3 CLJ 544 and *Lucy Wong Nyuk King (f) & Anor v Hwang Mee Hiong (f)* [2014] 6 MLJ 686; [2014] 8 CLJ 865, to fortify his arguments. Finally it was submitted that cl 17(3) is not a *non-obstante* provision as it does not contain the preposition 'notwithstanding' and therefore the clause is not to be read in isolation but must be read subject to cl 19(1). The definition of completion must therefore be drawn from cl 19(1), rebutting the presumption of the deeming provision of cl 17(3) of the SPA.

[33] Learned counsel for the appellant submitted the further findings of the said learned judge that the SPA makes a clear distinction between the 'right of possession' and the 'right of occupation' in that what has been promised by the appellant under the standard Form G contract is that within 24 months, the appellant would complete and to give vacant possession of the said building to the second respondent and third respondent but not the right of occupation within 24 months. *South East Asia Brickworks Sdn Bhd v Maria Antonette* [1979] 1 MLJ 46; *Syarikat Lean Hup (Liew Brothers) Sdn Bhd v Cheow Chong Thai* [1988] 3 MLJ 221; and *Maxisegar Sdn Bhd v Veronica Lee Ha Ling & Ors*

[2011] 5 MLJ 913 were cited to lend support thereof.

ISSUE FOR DETERMINATION

[34] Hence, in our view, the only issue before us is this: whether the computation of the LAD should commence within 24 months from the date of the SPA (11 August 2008) until the date of delivery of vacant possession of the property under cl 17 (21 April 2010) or within 24 months from the date of the SPA (11 August 2008) until the date of the issuance of the OP under cl 20 (14 November 2012) of the SPA.

OUR DECISION

[35] For ease of reference, we reproduce the relevant clauses planking the dispute before us.

Clause 17 of the SPA provides as follows:

> Handing Over Vacant Possession
>
> (1) Subject to Clause 18 herein below and provided that the Purchaser duly pays the instalments as provided and at the time set out in Clause 3 and duly pays all sums and monies due or payable by him to the Vendor pursuant to this Agreement, and provided further that the Purchaser shall have performed and observed, and shall not be in breach of any of the terms and conditions on his part to be performed and observed contained in this Agreement, the said *Building shall be handed over to the Purchaser* within twenty-four (24) calendar months from the date of this Agreement.
>
> (2) If the *Vendor fails to hand over vacant possession* of the said Building within the period stipulated in Subclause (1), the Vendor shall pay to the Purchaser monthly such sum as specified in the Sixth Schedule herein as *the agreed pre-estimated liquidated damages until the date of completion* of the said Building and if the said Building is completed on any day before the end of the month then the liquidated damages shall be calculated pro rata for that particular month.
>
> (3) *For the purpose of this Clause, the Building is deemed to be completed when the Certificate stipulated in Clause 20 below has been issued*. (Emphasis added.)

Clause 19 provides:

> Manner of Delivery of Vacant Possession
>
> (1) Upon the issuance of a *Certificate by the Vendor's Architect certifying that the construction of the said Building has been duly completed and water and electricity are available for connection to the said Building and the Vendor has applied for the issuance of the Certificate of Fitness for Occupation* from Appropriate Authorities and the Purchaser having paid all monies under Clause 3(1) in accordance with the Fourth Schedule and *all other monies*

A *due under this Agreement* and the Purchaser having performed and observed all the terms and covenants on his part under this Agreement, the Purchaser shall have possession of the said Property.

(2) Upon the expiry of fourteen (14) days from the date of a notice from the Vendor requesting the Purchaser to take possession of the said Property, whether or not the Purchaser has actually entered into possession or occupation of the said Property, the Purchaser shall be deemed to have taken delivery of vacant possession and the Vendor thereafter shall not be liable for any loss or damage to the said property and/or to the fixtures and fittings therein. (Emphasis added.)

Clause 20 provides:

Certificate of Fitness For Occupation

The Vendor shall, pursuant to the application for Certificate of Fitness for Occupation at its own cost and expense, duly comply with all the requirements of the Appropriate Authorities which are necessary for the issuance of the Certificate of Fitness for Occupation in respect of the said Building.

[36] In *Veronica Lee Ha Ling & Ors v Maxisegar Sdn Bhd* [2011] 2 MLJ 141, the Federal Court held that:

Now, cl 23 is part of a statute based contract. In this country, the relation between a house buyer and a licensed developer is governed by the housing developers legislation. Its object is to protect house buyers against the developers. *A developer must execute the agreement set out in the schedule to the relevant subsidiary legislation. He cannot add other clauses in it.* (Emphasis added.)

[37] The SPA in the present appeal, in particular cl 17(3), is equally not a mere agreement between two contracting parties but a statutorily sanctioned provision. It is trite that the SPA is substantially governed by reg II and Schedule G of the Housing Developers (Control and Licensing) Regulations 1988 ('HDCL Regulation'). They are actually provisions of Schedule H that had been imposed by law upon the parties and hence, are statutory provisions in that sense.

[38] Clause 17(3) of the SPA, which is peculiar only to the State of Sarawak, obviously is not there as a decorative item nor a product of verbosity. The formula in the said cl 17 was determined by the State Cabinet of Sarawak, led by its State Minister of Housing, designed to protect home buyers after balancing the interests of the buyers and developers in Sarawak. It is meant to be implemented and executed in the event of breaches in respect of cl 17(1) and (2). Hence, it is only appropriate to adopt in all the circumstances of the case, an interpretation that is in accord with s 17A of the Interpretation Acts 1948 and 1967 as were done by the learned judges in *Chinaya a/l Ganggaya v Sentul Raya Sdn Bhd* [2008] 2 MLJ 468; [2008] 3 CLJ 23 and *Hariram a/l Jayaram*

& Ors v Sentul Raya Sdn Bhd [2003] 1 MLJ 22; [2002] 4 CLJ 796. The said s 17A provides: A

> 17A Regard to be had to the purpose of the Act.
>
> In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object. B

[39] As stated earlier, learned counsel for the appellant had submitted that upon failure to deliver vacant possession of the said property to the second and third respondents within 24 months from the date of the SPA (11 August 2008, as the SPA was entered on 12 August 2006) pursuant to cl 17(1), the appellant, pursuant to cl 17(2), is only to pay LAD for the said late delivery at the agreed rate computed from the initial completion date (11 August 2008) until the date of completion signified by the issuance of a notice to take vacant possession of the said property pursuant to cl 19(1) of the SPA. Accordingly the LAD is to be paid only from 11 August 2008–21 April 2010 when vacant possession of the said property was delivered vide the said notice. C D

[40] However, we were of the view that such submission offends s 17A of the Interpretation Acts. In addition, to accept such argument is to make nonsense of the purpose of the HDCL Regulations or rather its parent Act, the Housing Developers Act and would render the said cl 17(3) of the SPA obtuse and redundant, defeating the paramount objective of inserting the said provisions into the SPA. E F

[41] It is our further view that the purport of cl 17(3) of the SPA is plain and clear. It strengthens the scope of cl 17(2) by offering a definitive meaning of 'the date of completion of the said building' appearing therein. It simply means that what amounts to 'date of completion' now is the delivery of a completed and habitable building fit for human occupation together with the certificate of fitness for occupation (CF) issued under cl 20 of the SPA. G

[42] In addition it now appears that the mere delivery of vacant possession of the said property by way of giving notice of vacant possession to the buyers under cl 19(1) and (2) is no longer sufficient to constitute completion. The requirement has now been modified in favour of the house buyers, providing additional protection from further victimisation by unscrupulous developers by the insertion of cl 17(3), which we think that the same, read as a whole in the context of the entire SPA and not in isolation as suggested fervently by learned counsel for the appellant, reflects the will of the contracting parties. If this is going to hurt the housing industry, it is for the developers to go back to the round table to trash the problem with those in authority. H I

[43] In constructing the said cl 17(3), at the risk of being repetitive, the learned judge had said at pp 27–28 of her grounds of judgment, of Vol 1 Part A, RR:

> To my mind, the meaning to be attributed to the words 'date of completion' in sub-cl (2) is governed by sub-cl (3). Sub-clause (3) reads: 'For the purpose of this Clause, the Building is deemed to completed when the certificate stipulated in cl 20 below has been issued'. It is to be noted that sub-cl (3) begins with the phrase 'For the purpose of this clause'. Giving the words 'for the purpose of this clause' their plain meaning, sub-cl (3) is meant to apply specifically to cl 17. By sub-cl (3) it is provided that the building is deemed to be completed when the occupation permit as stipulated in cl 20 has been issued. By extension therefore, the 'date of completion' in sub-cl 2 means the date when the occupation permit as stipulated in cl 20 has been issued. Hence, in my view, the tribunal had not erred in computing the LAD from the initial completion date (14 August 2008) to the date of issuance of the occupation permit on 14 November 2012.

[44] We were entirely on all fours with the learned judge on the interpretation of the said cl 17(3). There is no ambiguity in the said clause. It should be given its plain and ordinary meaning as interpreted by Her Ladyship and be given its legal effect, having regard to the purpose of the Housing Developers Act and the Regulation thereunder upon which cl 17(3) was planked.

[45] On construction of contract, the Court of Appeal in *Mulpha Pacific Sdn Bhd v Paramount Corp Bhd* [2003] 4 MLJ 357 at p 362; [2003] 4 CLJ 294 at p 301 stated:

> In the *Royal Selangor Golf Club v Anglo-Oriental (Malaysia) Sdn Bhd* [1990] 2 MLJ 163; [1990] 1 CLJ 995, Lim Beng Choon J said:
>
> In considering the disputes of the parties I must first of all bear in mind the general principles of construction of contract as enunciated in the *National Coal Board v Wm Neill & Son (St Helens) Ltd* [1984] 1 All ER 555 where it is said at p 560:
>
> > The first two issues involve the construction of the contract. I bear in mind the principles of construing a contract. The relevant ones for the purpose of this case are: (1) construction of a contract is a question of law; (2) where the contract is in writing the intention of the parties must be found within the four walls of the contractual documents; it is not legitimate to have regard to extrinsic evidence (there is, of course, no such evidence in this case); (3) a contract must be construed as at the date it was made: it is not legitimate to construe it in the light of what happened years or even days later; (4) the contract must be construed as a whole, and also, so far as practicable, to give effect to every part of it.
>
> In *Central Bank of India Ltd v Hartford Fire Insurance Co Ltd* AIR 1965 SC 1288, the Supreme Court of India lays stress on the second principle advocated in the *Wm Neill & Sons (St Helens) Ltd* case when it says at p 1290:
>
> > Now it is common place that it is the court's duty to give effect to the bargain of

> the parties according to their intention and when that bargain is in writing the intention is to be looked for in the words used unless they are such that one may suspect that they do not convey the intention correctly. If those words are clear, there is very little that the court has to do. The court must give effect to the plain meaning of the words however much it may dislike the result.

[46] In coming up with her decision (at para 42), we were satisfied that she had adhered to the principles discussed above. The plain meaning of the words in cl 17 was given its desired effect. The said clause obviously cannot be read subject to cl 19(1) as suggested by learned counsel for the appellant as to do so would render cl 17(3) inoperable, redundant and unable to serve its purpose of being enacted therein and hence, should not be there at all in the first place. It is a stand alone provision as submitted by learned counsel for the first respondent which we embraced wholeheartedly.

[47] The further consequential effect of applying or subjecting cl 17(3) of the SPA to the provision of clause 19(1) would be the enlargement or improvement of the terms of the SPA, an exercise strongly detested by the appellant, favouring only one side of the divide ie the appellant, leaving the home buyers out in the cold. It would equally offend the purport of HDCL Regulation and oust the primary purpose of having cl 17(3) in the agreement. This surely cannot be the intention of the parties when they entered the SPA.

[48] On the issue of enlargement and improvement of the contract and the deeming provision of cl 17(3) of the SPA, the learned judge had correctly summarised the position as follows, at pp 25–26, of the grounds of judgment, Vol 1, Part A, RR:

> The bone of contention of the applicant is that the tribunal had improved the contract in construing the words 'until the date of completion' in cl 17(2) to mean until the date the OP is issued and has thus made an error of law. The applicant argues that cl 17(3) of the SPA is not a final and conclusive clause but is merely a deeming provision which in law created nothing but a rebuttable presumption. Being a rebuttable presumption, cl 17(3) is not to be construed in isolation, but, must be construed in the totality of its surrounding provisions ie the entire contract. There is a distinction between a 'deeming' provision and a 'final and conclusive' provision. The former 'presumes' a fact while the latter 'concludes' a fact: see *Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor* [2006] 2 MLJ 685; [2006] 3 CLJ 544 Federal Court which illustrates the effect of a conclusive clause.
>
> [7] The applicant submits that cl 17(3) falls in the former category and it merely presumes a fact. The tribunal had fallen into error in construing cl 17(3) as a final and conclusive clause as opposed to its true nature of being merely a 'deeming' provision. What is the rebuttable presumption in this instance? That the subject property is 'deemed' completed when an occupation permit is issued. Being a 'deeming provision' it means that unless there are other facts or evidence to show

otherwise or in the absence of any evidence to show the contrary position, then the presumption would stand. The applicant submits that judging the contract as a whole, cl 17(1) and (2) reveal that the applicant is only under an obligation to (i) complete the building; and (ii) hand over vacant possession of the building to the second and third respondents within 24 months from the date of the SPA, failing which the applicant is to pay to the second and third respondents LAD at the agreed rate as per the 6th Schedule from the 'initial completion date' under the SPA until the 'date of completion (vacant possession)'. The applicant submits that such obligations cannot be enlarged.

[49] The learned judge's finding in respect of the same are as follows, at p 26, of the same volume:

> [8] With due respect, I do not agree with the applicant's contentions. The applicant faults the tribunal with having improved or enlarged the contract in computing LAD from the initial completion date (14 August 2008) to the date of issuance of the OP (14 November 2012), but in my view, it is the applicant, by the arguments outlined above, that is attempting to improve or enlarge the terms of the contract. The tribunal had construed and applied the provisions of cl 17 to compute the LAD and in my judgment, the tribunal has neither erred in resorting to cl 17 nor erred in the construction and application of it. It needs to be reiterated that the sole question of determination by the tribunal was what was the contractual time period for which the applicant was liable to pay LAD to the respondents as a consequence of the failure of the applicant to hand over vacant possession by the initial completion date.

[50] Again, we were entirely with Her Ladyship and had no further findings but suffice for us to add that it is trite law that we are not in the business of rewriting the terms and conditions of the contract between the parties — see *Mature Land Sdn Bhd v Atlantic Plantation Sdn Bhd* [2013] 4 MLJ 565.

[51] The appellant submitted that there is a distinction between 'right of possession' and 'right of occupation' and what has been promised by the appellant under the standard Form G contract is that within 24 months, it would complete and confer the right of possession to the second and third respondents by delivering upon them vacant possession of the property pursuant to cl 19(1) of the SPA. However, this does not entail the conferment of the right of occupation within that 24 months on account that the OP under cl 20 has yet to be applied. The property is considered fit for occupation and could be occupied only upon the issuance of the OP.

[52] Learned counsel for the appellant applied *Syarikat Lean Hup (Liew Brothers) Sdn Bhd v Cheow Chong Thai* [1988] 3 MLJ 221 and *Maxisegar Sdn Bhd v Veronica Lee Ha Ling & Ors* [2011] 5 MLJ 913 to fortify his argument. However we found these two cases to be of no assistance on account that firstly, the contracts in these two cases did not have identical or similar provision as in

cl 17(3) of the SPA in the present appeal and secondly, the provision being disputed in both cases carried a proviso stating that 'such possession shall not give the purchaser the right to occupy and the purchaser shall not occupy the said parcel until such time as the certificate of fitness from occupation is issued' which is non-existent in the SPA of the present appeal.

[53] In our view, in the present appeal the right of occupation is conferred upon the second and third respondents by virtue of cl 17 wherein the appellant is encumbered not only to deliver vacant possession of the said property within 24 months from the date the SPA was entered under cl 17(1) but also, under cl 17(3) to procure the issuance of the certificates stipulated under cl 20 within the same period. Only then is the property considered fit for occupation and could hence be legally occupied. Anything less than these would infringe the SPA and the appellant is liable to pay damages as the second and third respondents cannot legally enjoy the use of the property. Hence, there is no basis for the appellant to say that cl 17 of the SPA does not confer any right of occupation of the said property to the second and third respondent.

CONCLUSION

[54] We dismissed the appellant's appeal upon all the reasons given above. Correspondingly we also allowed the appeals by Tribunal For Housing Purchaser Claims, being the appellants, in the four other related appeals ie Civil Appeal Nos Q-01–475–12 of 2014; Q-01–476–12 of 2014; Q-01–477–12 of 2014 and Q-01–478–12 of 2014. We also award costs in the sum of RM5,000 for all the appeals and the deposits for the lodgement of these appeals are refunded.

Order accordingly.

Reported by Ashok Kumar